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November 29, 2016

Gary Shinnars  
Executive Secretary  
Office of the Executive Secretary  
National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570-0001

**Re: Request for Review of Regional Director's Dismissal of the Employer's Election Petition Filed Pursuant to Section 9 of the National Labor Relations Act**

1650 Broadway Associates, Inc.  
Case 02-RM-184263

Dear Mr. Shinnars:

This Firm represents 1650 Broadway Associates d/b/a Ellen's Stardust Diner ("Stardust" or "the Company") in the above-referenced matter. Please accept the following as Stardust's request for review pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations.

On September 14, 2016, Stardust filed an RM petition to determine whether or not a majority of its employees supported Stardust Family United ("the Union" or "SFU") as their collective bargaining representative. On October 26, 2016, Stardust filed a position statement ("Position Statement") with the NLRB Region-2 in support of the RM petition. On November 22, 2016, the Regional Director of NLRB Region-2 ("Regional Director") dismissed Stardust's

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petition, stating that the evidence “failed to show that the Union’s conduct constituted a present demand for recognition or that the Union was seeking recognition as the employees’ representative.” The Regional Director concluded that the petition did not raise a question concerning representation.

Stardust requests a review of the Regional Director’s decision on the following grounds. The Regional Director’s factual finding that the evidence did not show that the Union sought recognition as the representative of employees was a clearly erroneous finding on a substantial factual issue that prejudicially affects the rights of Stardust. Additionally the Regional Director’s dismissal of this petition raises a substantial question of law because it departs from Board precedent determining what constitutes a present demand for recognition. See New Otani Hotel & Garden, 331 N.L.R.B. 1078 (N.L.R.B. 2000); Robert’s Tires, 212 N.L.R.B. 405 (N.L.R.B. 1974); Holiday Inn of Providence, 179 N.L.R.B. 337, (N.L.R.B. 1969); Capitol Market No. 1, 145 N.L.R.B. 1430, (N.L.R.B. 1964). This request for review includes a summary of the factual background, evidence, applicable law and argument presented by the Company to the Regional Director, establishing why the Regional Director’s decision should be overturned.

## **I. INTRODUCTION**

SFU is a labor organization which repeatedly has represented to the Company that it represents a majority of the Company’s employees employed at Ellen’s Stardust Diner. SFU made a demand for immediate recognition and a demand to negotiate the terms and conditions of employment on behalf of the Company’s employees whom it claims to represent. Indeed, for weeks it engaged in a systematic campaign for its recognition including hand billing, picketing

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and protesting within and directly outside of Ellen's Stardust Diner. SFU also made media appearances and issued press releases declaring itself to be a union and claiming that it represents the employees who work at Ellen's Stardust Diner. SFU's campaign has been aimed at pressuring the Company to agree with it regarding the terms and conditions of employment of the Company's employees whom it claims to represent. In response to SFU's representations and request for bargaining, on September 9, 2016, the Company filed an RM petition pursuant Section 9 of the National Labor Relations Act ("the Act"). For the reasons set forth more fully below, the Regional Director erred and departed from Board precedent in dismissing this petition.

## **II. FACTUAL BACKGROUND & SUMMARY OF EVIDENCE**

### **A. About Stardust**

Stardust is a 1950s-themed restaurant located at the corner of Broadway and 51st Street in Manhattan. Stardust, notable for its singing wait staff, has been in business since 1987 . Many aspiring musical performers and actors are drawn to work as singing servers or wait staff, known as "Stardusters." They often are performers in between show business jobs and/or who are frequently auditioning and otherwise pursuing a full time career in show business or other entertainment.

### **B. SFU's Demand for Recognition and Continuing Campaign for Recognition**

On August 26, 2016, representatives of SFU e-mailed Ken Sturm, an officer of Stardust, declaring that "the employees of Ellen's Stardust Diner have organized to stand up for our rights and the conditions of our employment." (e-mail appended to Position Statement as Ex. A). That

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e-mail also identified those whom it claimed to represent, namely that “[SFU] represents the interests of all front and back of house staff.” (Id.) (emphasis added). That e-mail further indicated that SFU was “working to guarantee that all employees are safe, secure, fairly compensated and treated with the respect and dignity they deserve.” (Id.). Less than an hour later, representatives of SFU e-mailed Mr. Sturm again, asserting that “all further meetings with staff will be arranged through the union” and that certain employees, then noticed to meet with management, would not meet with Mr. Sturm if the purpose of those meetings was to discuss “union activity, including the job-related protected concerted activities that have been taking place at the diner.” (E-mail appended to Position Statement as Ex. B).

SFU again proclaimed that it had formed a union in an a *New York Times* interview published on August 26, 2016. (A Manhattan Diner’s New Management has Servers Signing a Defiant Tune appended to Position Statement as Ex. C). The *Times* article further reported SFU’s representations that over 50 workers were involved in organizing, that they had notified management of their newly formed union on August 26, 2016 and were “seeking a variety of changes, including higher wages for non-tipped employees, protection from what they describe as a campaign of arbitrary discipline and a measure of job security, which they believe they have lost under the new management regimen.” (Id.).

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On or about August 28, 2016<sup>1</sup>, SFU began publicly soliciting donations for “the union.” (SFU crowd-funding website appended to Position Statement as Ex. D.) Since that date, SFU has been engaged in a fundraising effort to finance the Union. (Id.).

On August 29, 2016, SFU issued another press release. (“Singing Waiters Organize Against Alleged Unfair Treatment at Ellen’s Stardust Diner” appended to Position Statement as Ex. E.) In that press release, SFU again represented that it is comprised of “all back of the house workers, servers, runners, bussers, dishwashers and cooks. . .” (Id.) (emphasis added). It further stated that through the assistance of another union, SFU has the resources “to form [their] own union on ‘their’ terms.” (Id.). Similar to its prior press release, SFU reiterated and unequivocally proclaimed “[i]n response to current working conditions, the employees of Ellen’s Stardust Diner have organized and are fighting for our rights and the conditions of our employment. Stardust Family United (SFU) represents the interests of all front and back of house staff.” (Id.) (emphasis added).

On the heels of its second press release, on August 30, SFU representatives identifying themselves as “union representatives” by e-mail requested to meet with Mr. Sturm at 1 p.m. on September 2 to discuss “restaurant operations” that would “benefit both the staff and the company.” (e-mail appended to Position Statement as Ex. F).

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<sup>1</sup> SFU may have been soliciting donations and seeking additional financial support earlier than August 28, 2016. However, this is the earliest public solicitation the Company has been able to identify. The fundraising page remains active as of December 2, 2106. SFU also has advertised on their Facebook page as recently as November 29, 2016 that SFU is selling t-shirts with logo “#wearestardust” to raise funds for the Union.

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On September 9, 2016, counsel retained by Stardust had a discussion with several self-identified leaders of SFU, including Kenton Fridley, to confirm SFU's demand to negotiate the terms and conditions of their employment with Company management. (Counsel's affidavit appended to Position Statement as Ex. G). During that discussion, SFU representatives again claimed to represent the majority of the employees at Ellen's Stardust Diner, including those in the "front and back of the house" which the SFU representatives clarified encompassed "servers, bussers, runners, cooks and dishwashers, among others." (Id.).

On September 9, 2016, the Company filed the RM petition currently at issue. It did so because the SFU demanded recognition by presenting itself as representing all front and back of the house employees at Ellen's Stardust Diner and by demanding to negotiate over compensation, employee treatment and other terms and conditions of employment. In addition, SFU has continued to engage in recognitional picketing at various times including on September 2 and September 5, September 26, October 11 and October 15.

On September 14, 2016, SFU issued another press release. The SFU e-mailed this press release directly to Mr. Sturm. (e-mail from SFU attaching press release appended to Position Statement as Ex. H). Declaring its intentions, purpose and current status, SFU titled the press release "Unionized Staff at Ellen's Stardust Diner to Stop Singing After Multiple Terminations." (Id.). The press release again indicated that SFU was the "Stardust employees' union branch" which was at that time "supported by over 70 employees of the restaurant." (Id.). That press release further stated that SFU would be "escalating union tactics." (Id.).

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Later that day, SFU again e-mailed Mr. Sturm requesting a meeting to discuss terms and conditions of employment including: “new equipment, adequate staffing and the immediate cessation of [alleged] Unfair Labor Practices and the reinstatement of all employees [allegedly] unlawfully fired on and after August 24th.” (e-mail appended to Position Statement as Ex. I). SFU’s correspondence further stated that they were “interested in coming to a solution that is agreeable for both sides.” (Id.).

Thereafter, SFU increased hand billing, picketing and protesting of Stardust. The handbills alleged, among other things, that the Company had responded to the “unionization” of its employees by firing six “union members and organizers.” (handbill appended to Position Statement as Exhibit J). The handbill further stated that in response to those firings “servers [would] cease all singing in the restaurant for short intervals throughout the day.” (Id.).

SFU has continued declaring itself as a union and harassing Stardust to compel recognition and bargaining.<sup>2</sup> At least once a week, SFU posts images and videos depicting numerous protests, including recognitional picketing in front of Ellen’s Stardust Diner. On October 15, SFU posted a video to its Facebook page (which is one of many) depicting its picketing and protesting. (video appended to Position Statement as Ex. K.) In the video, an SFU representative loudly and clearly declares that the employees of Stardust “formed a union” and declares that they are seeking “better [working] conditions.” (Id.) (emphasis added). Also on October 15, SFU picketed with signs declaring, among other things, “Hey! We’re a Union!”

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<sup>2</sup> October 22 was the most recent demonstration when the Position Statement was filed with the Regional Director. Demonstrations have continued since that time, with the most recent one occurring on November 26, 2016.

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(Id.). SFU has posted numerous other pictures on social media of their recognitional picketing efforts.

SFU also maintains a website, on which it declares, similar to its previous representations that the union was formed “[i]n response to current working conditions, the employees of Ellen’s Stardust Diner have organized and are standing up for our rights and the conditions of our employment. Stardust Family United (SFU) represents the interests of all front and back of house staff.” (website, <http://www.stardustfamilyunited.com/ourfamily>, cited in Position Statement).

### **III. LAW & SUMMARY OF ARGUMENT**

#### **A. Section 9 of the Act**

Section 9(c)(1) of the Act provides in relevant part that where a petition is filed: “(B) by an employer, alleging that one or more labor organizations have presented to [it] a claim to be recognized as the representative defined in section 9(a) . . . the Board shall [process the petition].”

Section 9(a) provides in relevant part: “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.” New Otani Hotel & Garden, 331 N.L.R.B. 1078 (N.L.R.B. 2000).



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Thus, an employer is entitled to an election pursuant to Section 9(c)(1)(B) if there is evidence of a demand for immediate recognition by a majority of employees in an appropriate bargaining unit. Id. This is true particularly as here where the employer is enduring constant pressure and subjected to business disruptions over two months as the Union asks for bargaining and recognition, as recognition is needed for bargaining. By dismissing the Company's petition for election, the Regional Director in this matter departed from Board precedent.

**B. SFU is a Labor Organization Which Claims to Represent a Majority of Employees.**

The Regional Director did not deny that SFU constitutes a labor organization under Section 2(5) of the Act. The Company agrees with the Regional Director that SFU satisfies the definition of a labor organization.

**1. Labor Organizations Under Section 2(5) of the Act.**

Section 2(5) of the Act defines a labor organization as: “[a]ny organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”

In order to constitute a labor organization under Section 2(5) the organization must satisfy two requirements: (1) employee participation and; (2) for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. See e.g. Polaroid Corp., 329 NLRB 424 (1999); Miller Indus. Towing

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Equip., Inc., 342 NLRB 1074 (2004). SFU clearly satisfies both of these requirements with regard to Stardust.

a. *SFU is Comprised of Stardust Employees*

SFU undoubtedly has employee participation. SFU has indicated on several occasions to both the Company and the general public that it represents employees of Stardust Diner, including those employees “in the front and back of the house.” (See e.g. Exs. A, B, C, F, & H.)<sup>3</sup> Moreover, SFU’s website clearly states “[i]n response to current working conditions, the employees of Ellen’s Stardust Diner have organized and are standing up for our rights and the conditions of our employment. Stardust Family United (SFU) represents the interests of all front and back of house staff.” See Stardust Family United, Our Family, available at <http://www.stardustfamilyunited.com/ourfamily>.) As such, SFU satisfies the first requirement.

b. *SFU Satisfies the “Dealing With” Requirement*

SFU also satisfies the second requisite element as its only articulated purpose is to deal with the Company concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work for the front and the back of the house employees. The Board and courts interpret the “dealing with” requirement broadly. In order to satisfy this requirement a labor organization must “exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions

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<sup>3</sup> All references to Exhibits refer to exhibits appended to the Position Statement submitted by the Company to the Regional Director on October 26, 2016 and described in the Factual Background & Evidence Summary section of this request.

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of work.” NLRB v. Cabot Carbon Co., 360 U.S. 203, 212 (1959). No magic words must be said in order for the SFU to satisfy the “dealing with” requirement. Moreover, the union need not be part of an established framework of an international or national union.

The SFU has satisfied the broad framework of the “dealing with” requirement. SFU has made several demands to Mr. Sturm to bargain over compensation, discipline and other terms and conditions of employment. See Exs. B, F & I. Even the “restaurant operations” issues that SFU sought to discuss with Mr. Sturm necessarily implicate employees’ terms and conditions of employment in the context raised by SFU of “stand[ing] up for our rights and the conditions of our employment.” See e.g. Exs. C, E, F, & J. As such, SFU unquestionably satisfies the “dealing with” element of Section 2(5). See Cabot Carbon Co., 360 at 212 (holding that an employee-committee system was a labor organization because it had discussions with management relating to seniority, job classifications, holidays, vacations, and various other conditions of employment); Thompson Ramo Wooldridge, Inc., 132 NLRB 993, 995 (1961) (holding that presentation to management of employee ‘views,’ even without specific recommendations as to what action is needed to accommodate those views, constitutes “dealing with” under Section 2(5).)

### **C. SFU Demanded Immediate Recognition**

#### *a. Present Demand for Recognition Established*

SFU has made a demand for immediate recognition and bargaining. The Regional Director’s finding that “[t]he evidence obtained during the investigation of the petition... fails to show that the Union’s conduct constituted a present demand for recognition” is clearly erroneous

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and it prejudicially affects the right of Stardust to obtain an election. A clearly erroneous ruling provides a compelling reason for the Board to review this decision. NLRB Rules & Regulations §102.67.

On August 26, 2016, SFU declared that it is the sole representative of Stardust employees and that “all further meetings with staff [would] be arranged through the union.” See Ex. B. Additionally, SFU has demanded a meeting with the Company to discuss the terms and conditions of employment of the employees at Stardust on at least three occasions. On August 30, SFU representatives requested to meet with Company representatives, including Mr. Sturm, to discuss a litany of working conditions that it previously had identified. Ex. B; see also Ex. G, Yessin Aff., ¶ 7. On September 9, SFU representatives again demanded to negotiate terms and conditions of employment with Stardust. Ex. G, Yessin Aff., ¶ 8. On September 14, SFU demanded a meeting and communicated that the purpose was to come to a “solution” that was “agreeable for both sides.” Ex. I.

While some of the demands may have been unartfully crafted, SFU’s meeting request and apparent attempt to prevent the Company from making any decisions on issues involving wages, benefits and other terms and conditions of employment of the employees without its involvement, as well as the SFU’s unambiguous attempt to bargain for the employees on their compensation and other terms and conditions of employment, amount to a demand by SFU for immediate recognition and bargaining. There would be no reason for the Company to meet with SFU over wages, benefits or other terms and conditions of employment unless that group was demanding recognition by the employer to recognize it as representing the employees.

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As such, SFU has made a demand for immediate recognition and the Company's election petition must be processed. See Robert's Tires, 212 N.L.R.B. 405 (N.L.R.B. 1974) (upholding employer's petition for an election pursuant to Section 9(c) because of the "circumstances giving rise to the picketing, including the Union's admitted attempt to persuade the employer" to come to an agreement regarding terms and conditions of employment); New Otani Hotel & Garden, 331 N.L.R.B. 1078 (N.L.R.B. 2000); Holiday Inn of Providence, 179 N.L.R.B. 337, (N.L.R.B. 1969); Capitol Market No. 1, 145 N.L.R.B. 1430, (N.L.R.B. 1964).

Moreover, the Board has found an immediate demand for recognition where in the context of other related events, an object of picketing is to press upon the employer a demand for immediate recognition. See e.g. Capitol Market No. 1, 145 N.L.R.B. at 1431 (holding that the union's threatened and initiated picketing was in furtherance of union's immediate recognitional claim after union demanded employer to sign a contract).

The Board has found a recognitional object in picketing activities when the purpose of proposed meetings between the union and the employer was to persuade the employer to hire union workers. Austin Constr. Co., 141 NLRB 283 (N.L.R.B. 1963) (finding a prohibited recognitional object for picketing under Section 8(b)(7) of the Act). When the Company did not respond to SFU's bargaining demands, SFU began engaging in organizational and recognitional picketing and has continued picketing Stardust's premises, repeatedly declaring its status as a union and proclaiming that it was seeking to negotiate terms and conditions of employment. See Ex. G, Yessin Aff., ¶ 5; Exs. J-O. Here, SFU's two month campaign of media and picketing and

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harassment at the Stardust restaurant is targeted at obtaining immediate recognition and persuading the Company to bargain with it.

The Board has explained that although some forms of picketing do not constitute a demand for recognition, “if informational or area standards picketing occurs in conjunction with other actions or statements establishing that the union’s real object is to obtain immediate recognition as the employee’s representative...the Board [will] find the union’s conduct is tantamount to a present demand for recognition.” New Otani, 331 NLRB 1078, \*9. In New Otani, the union’s requests for a neutrality and card-check agreement were not a present demand. In the instant matter, SFU’s actions and demands go beyond a request for neutrality or an agreement to a future card check.

SFU’s picketing in conjunction with press releases, written demands for bargaining, and its assertions, both to the public and to the Company, that it represents all Stardust employees establish the Union’s real object of immediate recognition. See New Otani, 331 NLRB 1078, \*9; Holiday Inn of Providence, 179 N.L.R.B. at 338 (holding that union’s comment “[a]re you ready to give up?” in the context of ongoing picketing was sufficient to constitute a continued interest in immediate recognition); Normandin Bros. Company, 131 N.L.R.B. 1225, 1226 (N.L.R.B. 1961) (holding that question affecting commerce existed concerning representation of certain employees of the employer under Section 9 because union’s picketing was consistent with a demand to bargain for a contract).

Therefore, SFU has made a demand for immediate recognition and the Board precedent should have compelled the Regional Director to grant this petition for election.

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*b. SFU Sought Recognition Despite Disclaimers*

The Regional Director also found that the evidence did not show “that the Union was seeking recognition as the employees’ representative.” (NLRB Decision to Dismiss, letter from Regional Director Karen P. Fernbach dated Nov. 22, 2016). The NLRB has held that explicit representations that employees are not requesting immediate recognition, when taken in context with other actions consistent with a demand for immediate recognition, are insufficient to defeat an employer’s election petition. See e.g. Holiday Inn of Providence, 179 N.L.R.B. at 338 (holding that letter to employer’s parent company indicating that the union was seeking permission in order to establish proper procedure for negotiating union contract was demand for immediate recognition despite later providing notice that it was “not attempting to organize the employees of this establishment and is not requesting recognition for this establishment”).

Therefore, SFU’s actions including engaging in organizational and recognitional picketing consistently and on many occasions throughout September and October up to and after the time of the Regional Director’s investigation and dismissal,<sup>4</sup> including demonstrations targeted directly at Company management undermine any argument that SFU has not demanded immediate recognition. See Exs. J-O. Thus, the representations that SFU is not and was not seeking recognition, its actions throughout September and October of 2016 belie that claim. See Grand Central Liquors, 155 NLRB 295, 301-02 (1965) (holding that employer’s election petition must be processed because the union’s entire course of conduct was inconsistent with its

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<sup>4</sup> Picketing or demonstrations have occurred nearly every Saturday through November, although not on November 19. Picketing has also occurred on September 26, October 11 and October 15.

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expressed disclaimers); Rusty Scupper, 215 NLRB 201 (1974) (holding that union had made a demand for recognition despite disclaimer that it was not seeking recognition because the disclaimer was inconsistent with object of picketing). Plainly and clearly, the SFU's actions are consistent with a demand for recognition as the Board has defined a demand in past precedent.

#### IV. CONCLUSION

The facts support the Company's basis for filing the RM Petition with the Board. Given that SFU is a labor organization claiming to represent the majority of Stardust's employees and is demanding immediate recognition, the Board under its statute is obliged to process the RM petition in this case. Accordingly, because SFU has made a demand for immediate recognition and continues to enforce that demand, the Regional Director's decision to dismiss was contrary to Board precedent. The Board should grant this request for review and should resume processing the RM petition.

A copy of this request for review has also been served on Benjamin N. Dictor, attorney for the Union, and on Karen P. Fernbach, Regional Director of the NLRB Region-2. Certificates of service are appended to this document.

Respectfully yours, ,

Patrick J. McCarthy



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cc: Karen P. Fernbach  
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